



Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert R. Corbin

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ARIZONA ATTORNEY GENERAL

Hon. B. L. Tims, Chairman
Arizona Corporation Commission
1690 West Adams
Phoenix, Arizona 85007

Re: I79-099 (R75-362)
and (R75-455)

Dear Chairman Tims:

Former Commissioner Ernest Garfield had sought our opinion on substantially the following questions:

1. Does the Arizona Corporation Commission have the authority to compel Arizona public service corporations to purchase fuel oil cooperatively or jointly?
2. Would joint or cooperative fuel oil purchasing by Arizona public service corporations be consistent with the federal antitrust laws if undertaken with the approval of the Arizona Corporation Commission, so that failure to take advantage of savings through such purchasing could be considered in rate making?

I

The Arizona Corporation Commission lacks authority to compel Arizona public service corporations to purchase fuel oil cooperatively or jointly. Except for its broad, constitutionally-vested powers over rates and charges of public service corporations, Ethington v. Wright, 66 Ariz. 382, 189 P.2d 209 (1948), the Commission's regulatory jurisdiction is derived from legislative authorization. Williams v. Pipe Trades Industry Program of Arizona, 100 Ariz. 14, 409 P.2d 720

(1966); Corporation Commission v. Pacific Greyhound Lines, 54 Ariz. 159, 94 P.2d 443 (1939). There are no statutory or constitutional provisions mandating joint or cooperative fuel oil purchases by public service corporations furnishing electricity, nor are there any such provisions requiring the Commission to order such joint purchases, either by rule or by special order. Moreover, we have found no constitutional or statutory provision which specifically permits the Commission either to order or to authorize joint fuel oil purchases. Therefore, if the Commission has the power either to order or to permit joint fuel oil purchases, that power must be reasonably implied from the Commission's more general statutory and constitutional powers.

In the first instance, the day-to-day operation and running of public service corporations are matters of management prerogative, and are beyond the power of the Commission to control--at least directly. In Southern Pacific Company v. Arizona Corporation Commission, 98 Ariz. 339, 404 P.2d 692 (1965) - a decision vacating a Commission order requiring the railroad to restore discontinued train service - the Supreme Court summarized the controlling philosophy, beginning with a quotation from a well-known United States Supreme Court opinion:

"It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership." State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981, 31 A.L.R. 807.

Moreover, it cannot be doubted but that a public utility may in the first instance, in the exercise of its managerial functions, determine the type and extent of service to the public within the limits of adequacy and reasonableness. Duquesne Light Co. v. Pennsylvania Public Utility Commission, 164 Pa.Super. 166, 63 A.2d 466. In the exercise of the regulatory power, the legislature may

interfere with the management of public utilities whenever public interest demands, but there is no presumption of an attempt on the part of the legislature to interfere with a corporation any further than the public interest requires and no interference will be adjudged by implication beyond the clear letter of a statute. Chesapeake & Potomac Telephone Co. v. Manning, 186 U.S. 238, 22 S.Ct. 881, 46 L.Ed. 1144. (Emphasis by the Court.) 98 Ariz. at 343.

Similarly Corporation Commission v. Consolidated Stage Co., 63 Ariz. 257, 161 P.2d 110 (1945), held that in assuming power over the transfer of stock in a public service corporation, the Commission had improperly exercised a power granted to the corporation to control its internal affairs. Moreover, in Application of Trico Electric Cooperative, Inc., 92 Ariz. 373, 377 P.2d 309 (1962), the Court held that the Commission's constitutional power to prescribe the forms of contracts to be used by public service corporations (Ariz. Const., Art. 15 § 3) does not give the Commission any authority to prescribe the substantive terms of such contracts.

This line of authority is consistent with the Commission's long-standing practice regarding utilities' expenditures. For example, the Commission has not presumed to interfere directly with management in decisions such as quantity, price and timing of purchases of supplies. The Commission's control over expenditures is exercised indirectly through financing approval for major capital expenditures (A.R.S. § 40-301 et seq.) and through rate regulation, by refusing to recognize imprudent expenditures in setting rates.

II

While the Commission can protect the ratepayer by refusing, in appropriate circumstances, to recognize obviously improvident expenditures as recoverable expenses, antitrust considerations preclude the use of this indirect regulatory technique to encourage Arizona public service corporations to purchase fuel oil jointly or cooperatively. Joint purchases would entail agreements between competing buyers as to the price to be paid and the allocation of the product among them. Price fixing and market allocation agreements among competitors

are per se violative of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970); e.g., United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. Sealy, Inc., 388 U.S. 350 (1967), and the Uniform State Antitrust Act, A.R.S. § 44-1402. Cf. A.R.S. § 44-1412 (Sherman Act § 1 interpretations are to guide construction of A.R.S. § 44-1402). Such agreements violate these state and federal statutes whether or not the parties to the agreement have the power to execute their unlawful plan to affect price or limit competition. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Moreover, the proscriptions of these statutes apply just as well to agreements among competing buyers as they do to agreements among competing sellers. See Bray v. Safeway Stores, Inc., 392 F.Supp. 851 (N.D. Cal. 1975).

Because the Arizona Corporation Commission lacks the authority to compel joint fuel oil purchasing, Commission action can confer no immunity from the federal antitrust laws. Acts of state officials mandated by state law, Parker v. Brown, 317 U.S. 341 (1943), or of private persons acting under compulsion of state law, Bates v. State Bar of Arizona, 433 U.S. 350 (1977), cannot form the basis for an antitrust claim. However, the anticompetitive conduct of private persons not specifically compelled by law enjoys no such immunity. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). As the Cantor decision makes explicitly clear, the state mandate must derive from statutory law and not a rule of a regulatory commission for the antitrust exemption to apply.

In Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962), for example, the Comptroller of Canada delegated his authority to regulate metals sales in Canada to Electro-Met, a private firm which, in exercising the power of the Canadian government, excluded plaintiff from the Canadian vanadium market. Holding for the plaintiff in a private treble damage action alleging conspiracy to monopolize by Electro-Met's American parent and others, the Court made clear that the antitrust laws apply to private activities permitted but not required by law. Inasmuch as the Canadian government did not compel discriminatory purchasing, the defendants' exclusionary practices were not shielded from the antitrust attack under the state action doctrine, even though the exclusion was accomplished through private exercise of the sovereign powers of the Canadian government.

More recently, the United States Supreme Court held that a minimum fee schedule for lawyers with an enforcement mechanism violated § 1 of the Sherman Act. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). To be immune, the "anticompetitive activities must be compelled by the direction of the State acting as a sovereign." 421 U.S. at 791. This requires that (1) a statute or its equivalent clearly manifest the decision of the duly-constituted state authorities to abandon a policy in favor of competition with regard to particular activities, and (2) the specific action clearly be that of the state and not that of private individuals. Since the action of the Virginia State Bar in establishing a minimum fee schedule did not meet these standards, the bar association was subject to antitrust liability for using its bar disciplinary powers for this purpose, despite ultimate enforcement by Virginia's Supreme Court of Appeals, and despite the fact that the bar association acted as a state agency for some purposes.

The "state action" doctrine was further narrowed in Cantor v. Detroit Edison Co., supra. In that case, plaintiff challenged a power company's light bulb distribution plan as an unlawful tying arrangement. The plan could not be terminated legally so long as tariffs approved by the Michigan Public Service Commission remained in force. However, defendant had initiated the tying arrangement in filing tariffs with the commission, and had continued it by renewing it in each subsequent filing. Assuming that it would never be acceptable to impose statutory liability on a party who had done nothing more than obey a state command, the Court held that the defendant utility's contribution to the mixture of state and private decision-making which resulted in the light bulb program was a sufficient predicate for liability. "[N]otwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." 428 U.S. at 593.

That only conduct controlled by the state as sovereign is exempt from the antitrust laws was again confirmed in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Acting as an agent for the Supreme Court of Arizona, the State Bar of Arizona participated in the enforcement of a disciplinary rule promulgated by the Arizona high court barring advertising by attorneys. The United States Supreme Court found (1) that the disciplinary rule against advertising had been adopted as the

policy of the state by the state court; (2) that the Supreme Court of Arizona is the body vested with the authority to articulate the state's policy with respect to the conduct of lawyers; and (3) that the disciplinary rule at issue was directed at an activity over which the state had traditionally and with reason assumed control. Since the conduct of the State Bar of Arizona in enforcing the ban against advertising was thus plainly compelled by the sovereign command of the state, it was exempt from the antitrust laws.

None of the standards for exemption set forth in the cases amplifying Parker v. Brown are satisfied in the case of joint fuel oil purchasing by Arizona utilities. First, the lack of direct power in the Arizona Corporation Commission over the purchasing practices of Arizona utilities indicates that private decision making would be so predominant in the institution of a joint or cooperative fuel oil purchasing plan that Commission action could confer no immunity from federal antitrust laws. Moreover, the Corporation Commission cannot articulate the policy of the State of Arizona with respect to utility purchasing practices because it is not vested with authority to regulate those practices. Lastly, the purchasing practices of utilities in Arizona have not been subject to state control.

The absence of Legislative or constitutional direction to the Commission even to address the purchasing practices of the utilities under its jurisdiction prevents any guarantee to individual members of the Commission that they would be exempt by virtue of the state action doctrine from liability in an action for damages for acts committed in furtherance of a purchasing scheme which violates the antitrust laws. As the previously-discussed authorities demonstrate, only the state itself is immune from liability under the antitrust laws. If the Commission were to further an illegal anticompetitive scheme in the absence of authority to address the subject matter of the scheme, the action of the Commissioners may be seen as individual rather than state action.

Although the application of the federal antitrust laws to public agencies or offices presents "an entirely different case" than their application to private persons, Bates v. State Bar, 97 S.Ct. at 2796, the rationale of Parker v. Brown, supra, admits of such application where the agency or officer is acting entirely without authority. The major premise of Parker

was that the Sherman Act was not intended "to restrain a state or its officers or agents from activities directed by its legislature. . . . [A]n unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Parker v. Brown, 317 U.S. 350, 351. However, if an officer or agency reaches beyond legislatively-granted authority by conduct which violates the antitrust laws, the rationale for holding the Sherman Act inapplicable disappears.

As a result of the affirmation, by Goldfarb and Cantor, of the principle that legislatively-directed conduct is at the core of state action immunity from the antitrust laws, several courts of appeals have held governmental action subject to antitrust attack when it does not enjoy legislative sanction. In Kurek v. Pleasure Parkway and Park District, 1977 Trade Cas. ¶ 61,448 (7th Cir. 1977), the park district and the individual members of its governing body allegedly attempted to coerce competing concessionaires at district facilities to fix prices. The antitrust action brought by the concessionaires was dismissed by the district court on the theory that the conduct complained of was that of a municipal corporation and therefore exempt by virtue of Parker v. Brown, *supra*. The court of appeals reversed the dismissal, holding that the alleged coercion was not exempt on its face because it was not even "authorized, let alone compelled," by state law. The court of appeals recognized that a state action exemption for otherwise illegal anticompetitive conduct by a "subordinate governmental unit" could be based on a "state mandate ' . . . inferred from the nature of the powers and duties'" of the subordinate unit, but held that the mere fact that the alleged conduct concerned the governmental unit's property and involved its power to contract was insufficient to exempt that conduct.

Dismissal of an antitrust action against certain Pennsylvania municipal corporations for conspiracy to boycott was reversed in Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975). Because there was "nothing explicit or implicit in the [the] statutory authority [of the municipal corporation] which mandates or even permits [collusive] discrimination against certain suppliers," the complaint against these municipalities was not insufficient as a matter of law. By contrast, a finding that certain contracts were entered pursuant to "specific statutory authorization" immunized a state agency from antitrust exposure under state and federal law for

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entering the allegedly anticompetitive contracts. Anderson v. Commission on Special Revenue, 1977 Trade Cas. ¶ 61, 726 (Conn. Super. Ct. 1977).

The state action exemption did not prevent an antitrust action against a Connecticut town. The town's practices in connection with its purchase of insurance were allegedly inconsistent with state purchasing laws. In Azzaro v. Town of Branford, 1974 Trade Cas. ¶ 75, 337 (D.Conn. 1974), the federal district court held the state action exemption inapplicable because the allegedly anticompetitive purchasing practices were contrary, rather than pursuant, to state law.

To summarize, given the absence of specific legislative or constitutional authority, the Arizona Corporation Commission cannot confer antitrust immunity on Arizona utilities by participating with them in an anticompetitive purchasing scheme. Quite the contrary, the Commission's lack of direct authority over utility purchasing practices may prevent individual Commissioners from successfully claiming a "state action" immunity to shield from antitrust attack their participation in the establishment of joint purchasing practices.

Because the activity which is the subject matter of this request is clearly violative of the federal act and, therefore proscribed, we find it unnecessary to decide whether A.R.S. § 40-246 provides an exemption from the state antitrust act on these matters.

Sincerely,



BOB CORBIN
Attorney General

BC/mm